Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

UBS PAINEWEBBER INC. AND RICHARD WILHELM,

Petitioners,

v.

ALFRED COHEN, EXECUTOR OF THE ESTATE OF SAMUEL GINSBURG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR HAMILTON COUNTY, OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, contains a state common-law intentional-tort exception to the enforcement of arbitration clauses that cover "any and all" disputes between a broker-dealer and a client?

PARTIES TO THE PROCEEDING

Petitioners in this case are UBS PaineWebber Inc., a wholly-owned subsidiary of UBS AG, and Richard Wilhelm, an employee of UBS PaineWebber Inc. The respondent is Alfred Cohen, executor of the estate of Samuel Ginsburg.

With the exception of Richard Wilhelm, this case involves the same parties and the same underlying dispute as Case No. 01-1665, in which Alfred Cohen is the petitioner and UBS PaineWebber Inc. is the respondent.

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The decision of the Ohio Supreme Court denying review of the Hamilton County Court of Appeals' decision is unreported and is reproduced (Pet. App. 1a) in the appendix to this petition. The decision of the Hamilton County Court of Appeals is unreported and is reproduced (Pet. App. 4a-10a) in the appendix to this petition. The decision of the Hamilton County Court of Common Pleas is unreported and is reproduced (Pet. App. 11a) in the appendix to this petition.

JURISDICTION

The Ohio Supreme Court declined to review the Hamilton County Court of Appeals' decision on May 15, 2002. Pet. App. 1a. Jurisdiction in this Court exists under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

INTRODUCTION

Despite the unyielding language of the Federal Arbitration Act (FAA), which makes "enforceable" in state or federal court any arbitration agreement "involving commerce," *id.*, this Court has frequently been asked to turn back state-law attempts to undermine the national enforceability of arbitration agreements. In *Perry v. Thomas*, 482 U.S. 483 (1987), the

Court held that a former Kidder, Peabody salesman could not invoke a California law that attempted to create a judicial forum for all wage disputes. The FAA, the Court concluded, preempted such state-law efforts to undermine the enforceability of a valid arbitration agreement between the salesman and his former employer. In *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996), the Court determined that the FAA preempted a Montana law that required all arbitration clauses to appear on the first page of a contract. And in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), the Court determined that the FAA preempted an Alabama law invalidating all pre-dispute arbitration agreements. In doing so, the Court rejected the contention that an arbitration contract could not be enforceable if the parties did not "contemplate" that their dispute would involve interstate commerce. 513 U.S. at 278-79. In each of these cases, the Court held that the Supremacy Clause prevented the States from enacting legislation that undercut the enforceability of valid arbitration contracts in particular and the FAA's national policy in favor of arbitration in general.

Today's case presents a variation on a theme. Rather than enact a state law that directly alters the FAA's broad presumption in favor of the enforceability of arbitration agreements, Ohio has tried indirectly to do the same thing through the common law of its courts. In this instance, the Ohio courts innovated an intentional-tort exception to a run-of-the-mill securities arbitration agreement that applies by its broad terms to "any and all controversies" between the parties.

To date, no federal court of appeals has adopted this gaping exception to the FAA, and numerous circuits and state courts have expressly rejected it. At the same time, however, the Alabama and Florida Supreme Courts (like the Ohio courts here) have developed an intentional-tort exception to the FAA that, like the decision here, utterly dilutes the federal policy in favor of arbitration. If this intentional-tort exception is allowed to take root in other States, none of which must follow

contrary federal court of appeals precedent, it is no exaggeration to conclude that the enforceability of arbitration provisions in collective bargaining agreements, accounts with member firms of the National Association of Securities Dealers, and all manner of other commercial settings will be severely disrupted. The enforceability of such agreements will turn not on Congress's national policy of encouraging arbitration but simply on the causes of action pleaded in the first-filed civil complaint. Review is needed to put this issue to rest before the gulf between state and federal court interpretations of arbitration agreements broadens any further.

STATEMENT

On August 11, 1992, Samuel Ginsburg entered into a "Client's Agreement" with UBS PaineWebber Inc. f/k/a PaineWebber, Incorporated ("PaineWebber"), under which Ginsburg agreed to arbitrate "any and all controversies" between him and PaineWebber. Among other things, the detailed arbitration provision states:

> I agree, and by carrying an account for me PaineWebber agrees, that any and all controversies which may arise between me and PaineWebber concerning any account, transaction, dispute or the construction, performance, or breach of this or any other agreement, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration. Any arbitration under this agreement shall be held under and pursuant to and be governed by the Federal Arbitration Act . . . .

Pet. App. 5a-6a.

Ginsburg and PaineWebber subsequently executed a "Master Account Agreement" that contains a second arbitration agreement. This agreement mirrors the first one, except that it not only references disputes between Ginsburg and PaineWebber but also specifies that it governs disputes between Ginsburg and "[PaineWebber's] employees or

agents." Master Account Agreement, filed as Exhibit 1 to Defendants PaineWebber's and Richard Wilhelm's Memorandum in Opposition to Plaintiff's Motion for Temporary Restraining Order, *Cohen v. PaineWebber, Inc.*, No. A0004567 (Ohio Ct. Com. Pl. filed July 28, 2000). Like the first agreement, the second one specifies that, in the event of his death, Ginsburg's "personal representatives, heirs, estate, executors, administrators, committee and/or conservators, successors and assigns" are bound by the agreement. *Id.*

On October 9, 1999, Ginsburg died. *Id.* at 6a. Soon thereafter, Alfred Cohen was appointed to be the executor of Ginsburg's estate.

On July 26, 2000, Cohen (in his capacity as executor of the Ginsburg estate) filed this civil action in state court against PaineWebber and one of PaineWebber's managers, Richard Wilhelm. The action sought damages for alleged wrongdoing by a former broker of PaineWebber, Richard Zenni. In bringing the complaint, Cohen claimed that PaineWebber and Wilhelm committed two torts, unlawful conversion and fraudulent concealment, and sought compensatory and punitive damages. *Id.* Cohen did not name Mr. Zenni, the individual directly involved in the alleged torts, as a defendant. Rather, respondent's claims were premised entirely on a failure-to-supervise theory.

Because Cohen's action violated not just one, but two, arbitration agreements, PaineWebber sought to halt the state-court litigation. On July 28, 2000, just two days after the commencement of the state-court action, PaineWebber filed a diversity action in federal district court, seeking to compel Cohen to arbitrate his claims under the FAA. *Id.* At the same time, and again in accordance with the underlying arbitration agreements, PaineWebber filed a motion in state court seeking to stay the action there pending a ruling by the district court on PaineWebber's claim. Because the parties ultimately agreed

not to proceed with the state court action while the federal petition was pending, the state court did not rule on the motion and with one minor exception no further proceedings occurred in the state court until January 2001. At that time, the district court dismissed PaineWebber's action for failure to name an indispensable party, Richard Wilhelm, who (like Cohen) was a resident of Ohio. *Id.*

On January 12, 2001, PaineWebber moved the state court to compel Cohen to arbitrate his claims in accordance with the arbitration agreements. In opposition, Cohen conceded that the agreements existed, that they were valid, and that they were binding on the estate. He argued, however, that conversion and fraudulent concealment claims were exempt from arbitration and from the FAA as a matter of law. In a one-sentence analysis, the Hamilton County Court of Common Pleas agreed, stating merely that the motion to enforce the arbitration agreement was "not well taken" as a matter of law. Pet. App. 11a.

PaineWebber and Wilhelm appealed the trial court's decision. Relying on decisions from this Court confirming the FAA's strong national presumption in favor of arbitration, they argued that the trial court's decision would create a conspicuous exception to most arbitration agreements. "By overruling PaineWebber's and Wilhelm's motion to stay and declining to enforce the written arbitration agreements that Ginsburg signed," petitioners argued, "the trial court's decision below directly undermines the arbitration provisions of the FAA and . . . breeds the very type of litigation that such well-settled law seeks to avoid." Brief of Appellants PaineWebber Incorporated and Richard E. Wilhelm, at 8 (quotation omitted), *Cohen v. PaineWebber, Inc.*, No. C-010312 (Ohio Ct. App. filed July 26, 2001).

Nevertheless, on January 18, 2002, the Hamilton County Court of Appeals affirmed. Pet. App. 4a-10a. It acknowledged (by citation) the applicability of decisions

arising under the FAA, *see* Pet. App. 8a n.5 (citing *Marchese v. Shearson Hayden Stone, Inc.*, 734 F.2d 414, 423 (9th Cir. 1984)), and recognized that the arbitration agreement was "broad," Pet. App. 9a. But it nonetheless proceeded to ignore the federal policy in favor of arbitration and the numerous precedents from this Court respecting that policy. Instead, it determined that unlawful conversion and fraudulent concealment claims are not subject to arbitration as a matter of law:

> Although the arbitration provision is broad, stating that it covers "any and all controversies" pertaining to the brokerage account, we cannot say, as a matter of law, that a claim alleging such tortious conduct as the "aiding and abetting" of a theft is subject to the arbitration provision here. An arbitration clause itself is a contract. A contract requires a "meeting of the minds" as to the terms contained within. At the time the parties entered into the contract, there was no meeting of the minds that the arbitration provision would cover claims alleging tortious forms of theft. If the parties had contemplated, at the time they entered into the arbitration agreement, that PaineWebber would possibly steal from Ginsburg, that would surely be against public policy. . . . Accordingly, under the stated circumstances in this case, we hold that, as a matter of law, the claims of unlawful conversion and fraudulent concealment, were not subject to the arbitration provision.

Pet. App. 9a. In the view of the appellate court, in other words, the enforceability of an arbitration agreement turned not on federal "public policy" favoring arbitration but instead on an Ohio "public policy" disallowing the arbitration of intentional torts.

Petitioners sought discretionary review in the Ohio Supreme Court. In doing so, they explained that the court of appeals' decision would create a gaping hole in the FAA, was inconsistent with numerous precedents from this Court, and in

the end would dramatically undermine the national policy in favor of enforcing arbitration agreements. On May 15, 2002, however, the Ohio Supreme Court refused to hear the appeal. Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

This petition satisfies each of the traditional hallmarks for obtaining review. There is a division of lower-court authority between those courts that have innovated an intentional-tort exception to the FAA and those courts that have held the FAA's policy in favor of arbitration preempts such innovations. The Ohio courts erred in ruling that the FAA's policy in favor of arbitration may be trumped by a State's common law "public policy" against the arbitration of intentional torts. And the issue is one of surpassing importance because the theory of the Ohio courts—that an arbitration clause covering "any and all controversies" between the parties does not extend to intentional torts—knows no boundaries, is endlessly manipulable, and in the final analysis will severely upset Congress's broad national mandate in favor of arbitration. The Court should grant review or at a minimum summarily reverse the decision below.

I. A Division Of Authority Exists On The Question Presented.

The conflict of authority implicated by the question presented is primarily between the federal courts of appeal on the one hand and several state courts on the other. On one side of the ledger, numerous federal courts of appeals have held that when two parties have entered into an arbitration agreement covering "any" or "all" or "any and all" controversies between them, those words carry their customary meaning and encompass all causes of action, including intentional torts. On the other side of the ledger, a handful of state courts have limited the enforceability of

similar arbitration clauses to contract-based causes of action and specifically refused to extend them to intentional torts.

The position favoring the arbitration of intentional-tort claims has considerable company. One federal appellate court after another has held that when two parties agree to arbitrate "any" or "all" disputes between them, the agreement covers intentional torts ranging from fraud and conspiracy, *see Long v. Silver*, 248 F.3d 309 (4th Cir.), *cert. denied,* 122 S. Ct. 213 (2001), to defamation, *see Coudert v. Paine Webber Jackson & Curtis*, 705 F.2d 78, 81-82 (2d Cir. 1983), to intentional infliction of emotional distress, *see Aspero v. Shearson American Express, Inc.*, 768 F.2d 106, 107 (6th Cir. 1985) (quotation omitted) (holding that arbitration agreement encompassing "[a]ny controversy . . . arising out of employment or termination of employment" included former broker's claims for defamation, invasion of privacy, and intentional infliction of emotional distress), *cert. denied,* 474 U.S. 1026 (1985).

Typical of these cases is *Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382 (11th Cir. 1996). There, disgruntled purchasers of stock in a closely-held corporation brought seven claims against the sellers with whom they had a written contract that included an arbitration agreement. At the trial level, the district court held that the plaintiffs' seven claims, including counts for "fraud, fraudulent inducement, deceit, misrepresentation, conversion, breach of good faith and fair dealing, and outrage," fell outside the parties' agreement to arbitrate all disputes "arising under" the stock purchase agreement. *Id.* at 384. Not so, the Eleventh Circuit held. Where the underlying contract formed the foundation of the parties' relationship, and the claims arose from one side's "failure to fulfill its perceived obligations," the parties' disputes are fully arbitrable no matter how denoted. *Id.*

The Seventh Circuit has taken a similar position. "[A] party may not avoid a contractual arbitration clause," it has

concluded, "merely by casting its complaint in tort." *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.*, 1 F.3d 639, 643 (7th Cir. 1993) (quotation omitted). Indeed, the arbitrability of intentional tort claims has become, at least for the federal courts of appeal, relatively routine. *See, e.g., Kerr-McGee Ref. Corp. v. M/T Triumph*, 924 F.2d 467, 468, 469 (2d Cir. 1991) (affirming award of treble damages for RICO and civil conversion claims under arbitration agreement applicable to "any and all . . . disputes of whatever nature arising out of" the parties' contract); *Wood v. Prudential Ins. Co. of America*, 207 F.3d 674, 681 (3d Cir. 2000) (common law defamation and intentional infliction of emotional distress claims within scope of NASD arbitration clause); *Am. Recovery Corp. v. Computerized Thermal Imagery, Inc.*, 96 F.3d 88, 90 (4th Cir. 1996) (quotation omitted) (breach of fiduciary duty, tortious interference, quantum meruit claims arbitrable under clause concerning "[a]ny dispute, controversy, or claim arising out of or related to" contract); *Pers. Sec. & Safety Sys., Inc. v. Motorola, Inc.*, No. 01-11040, 2002 WL 1413702, at *4 (5th Cir. 2002) (holding common law fraud claim arbitrable under agreement covering "matters . . . arising out of or relating to this [a]greement"); *Harter v. Iowa Grain Co.*, 220 F.3d 544, 549 (7th Cir. 2000) (holding federal RICO, state RICO, Commodities Act, common law fraud, breach of fiduciary duty, intentional infliction of emotional distress claims all arbitrable under contract calling for arbitration of "any disputes or controversies arising out of" hedge-to-arrive commodities contracts); *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 793 (8th Cir. 1998) (holding fraud claim arbitrable); *Marchese v. Shearson Hayden Stone, Inc.*, 734 F.2d 414, 419 (9th Cir. 1984) (holding common law breach of fiduciary duty claim arbitrable under arbitration clause applicable to "[a]ny controversy arising out of or relating to my account") (quotation omitted); *Brown v. Coleman Co.*, 220 F.3d 1180, 1184 (10th Cir. 2000) (holding defamation claim and equitable remedies within scope of "all disputes or controversies arising under or in connection with" contract) (quotation omitted),

cert. denied 531 U.S. 1192 (2001); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 705 (D.C. Cir. 2001) (affirming confirmation of award in case where arbitration had been compelled for federal and state employment discrimination claims, federal and state equal pay claims, and common law defamation and fraud claims).

Some state supreme courts have taken a similar view. *See, e.g., Rossi Fine Jewelers, Inc. v. Gunderson*, No. 2002 SD 82, 2002 WL 1483225 (S.D. July 10, 2002) (applying FAA to hold that arbitration clause in franchise agreement was broad enough to include common law claims for breach of covenant of implied duty of good faith and fair dealing, actual fraud, constructive fraud, deceit and misrepresentation); *Weitz v. Hudson*, 546 S.E.2d 732 (Va. 2001) (holding that claims for conversion of partnership assets were subject to arbitration under partnership agreement); *Hirschfeld Prods. v. Mirvish*, 673 N.E.2d 1232, 1233 (N.Y. 1996) (holding that arbitration clause encompassed claims for common law tortious interference and breach of fiduciary duty).

While the contrary position adopted by the Ohio courts represents a distinct minority view, it is not without company. In *Ex parte Discount Foods Inc.*, 711 So. 2d 992 (Ala.), *cert. denied sub nom. Supervalu Inc. v. Discount Foods, Inc.*, 525 U.S. 825 (1998), *reconsidered in part* 789 So. 2d 842 (2001), the Alabama Supreme Court considered an arbitration agreement obligating a grocery store and its suppliers to arbitrate "[a]ny controversy or claim arising between the parties, including, but not limited to, disputes relating to this [a]greement." *Id.* at 993 (quotation omitted). In the court's view, the clause did not govern the grocer's claims for tortious interference with contract, unfair competition and violation of trade secret laws. "To hold otherwise," the Alabama Supreme Court concluded, "would allow persons signing broad arbitration provisions to commit intentional torts against one another, which torts are outside the scope of their contemplated dealings, without concern that they might have

to answer for their actions before a jury of their peers." *Id.* at 994.

The Florida Supreme Court has followed a similar path. In *Seifert v. U.S. Home Corp.*, 750 So. 2d 633 (Fla. 1999), the court considered a wrongful death claim brought by a home purchaser against a builder who installed an allegedly faulty air conditioner. That court, like the Alabama and Ohio courts, held that the claim was not subject to arbitration because wrongful death was "predicated upon a tort theory of common law negligence unrelated to the rights and obligations of the contract." *Id.* at 640. Before reaching this conclusion, the Florida Supreme Court—without citing the FAA—acknowledged that this Court has held that "claims for fraud, misrepresentation, breach of contract, breach of fiduciary duty, and violation of state franchise investment law" all fall within the contractual promise to arbitrate "[a]ny controversy or claims arising out of or relating to" a contract. *Id.* at 637, (*citing Southland Corp. v. Keating*, 465 U.S. 1, 15 n.7 (1984)). But rather than follow that guidance, the Florida Supreme Court turned instead to an Arizona lower court decision. *See Seifert*, 750 So. 2d 639-641 (discussing *Dusold v. Porta-John Corp.*, 807 P.2d 526 (Ariz. Ct. App. 1990)). "'If . . . the duty alleged to be breached is one imposed by law in recognition of public policy,'" the Florida Supreme Court quoted, a claim brought for violation of that duty "sounds in tort" and is not subject to arbitration. *Seifert*, 750 So. 2d at 639 (emphasis omitted) (quoting *Dusold*, 807 P.2d at 531).

In the face of this mature and increasingly deep division of authority, review is appropriate. As the case reporters confirm, not only have several state courts charted a different course on this issue from the uniform holdings of the federal courts of appeal, but many of those decisions conflict with respect to the same state jurisdiction. The writ should be granted (1) to establish uniform commercial expectations regarding the enforceability and scope of traditional arbitration clauses and (2) to ensure that Congress's national policy in

favor of arbitration is not diluted by inconsistent state court decisions.

II. The Ohio Courts Erred In Creating An Intentional-Tort Exception To The FAA Under That State's Common Law "Public Policy."

Besides implicating a deep division of lower-court authority, the lower courts erred in resolving the question presented. No precedent of this Court supports the creation of such an imposing state exception to the FAA's national policy in favor of arbitration, and many of the Court's precedents specifically contradict such state authority. For this reason alone, the petition should be granted.

At this late date, there can be little doubt that federal law affirmatively "compels judicial enforcement of a wide range" of arbitration agreements. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). And this "strong federal policy in favor of enforcing arbitration agreements," *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985), not only compels courts "rigorously [to] enforce agreements to arbitrate," *id.* at 221, but also creates a strong presumption in favor of arbitration. As the Court has explained:

> The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitration.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). If two parties choose voluntarily to sign an arbitration agreement covering their disputes, in other words, the National Legislature has left the courts with "no place for the exercise of discretion" in enforcing the terms of that agreement. *Dean Witter*, 470 U.S. at 218.

Neither has the Court left open the question whether non-contractual theories of relief must be arbitrated: They

assuredly must be. The Court has consistently concluded that arbitration agreements of comparable breadth cover disputes as diverse as age discrimination, *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), violations of the Securities Act of 1933, *see Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), actions under the Securities Exchange Act of 1934, *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), anti-fraud actions under RICO, *id.*, and antitrust violations under the Sherman Act, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

The Court also has not hesitated to strike state statutes that conflict with the FAA's pro-arbitration mandate. *Perry v. Thomas*, 482 U.S. 483 (1987), for example, held that a former Kidder, Peabody salesman could not rely upon a California law that attempted to create a judicial forum for all wage disputes. In the Court's view, the FAA preempted such state-law efforts to undermine the enforceability of a valid arbitration agreement between the salesman and his former employer. In *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), the Court determined that the FAA preempted a Montana law that required all arbitration clauses to appear on the first page of a contract. And in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), the Court determined that the FAA preempted an Alabama law invalidating all pre-dispute arbitration agreements. In doing so, the Court rejected the same "meeting of the minds" school of thought embraced by the Ohio courts here—that an arbitration contract could not be enforceable if the parties did not "contemplate" that their dispute would involve interstate commerce. *See* 513 U.S. at 278-79. Confirming the consistency of this line of decisions, the Court recently rejected a state-law argument that an individual's right to judicial review survived a parties' arbitration agreement to the contrary. *Circuit City*, 532 U.S. at 121-22. One cannot respect the Ohio courts' "public policy" exception to the FAA

without slighting this Court's uniform body of precedent to the contrary.

Not only do the Court's decisions fail to suggest that the enforceability of an arbitration agreement stops at the threshold of a common-law intentional tort, but every relevant decision in the last two decades points directly in the opposite direction. In the first and final analysis, the federal policy in favor of arbitration requires the parties' agreement to be "generously construed" in favor of private resolution. *Mitsubishi Motors*, 473 U.S. at 626. The Ohio courts' failure to hew to this well-traveled path supports the writ or in the alternative requires a summary reversal.

III. The Question Presented Is Important And Recurring In Nature.

The subject matter of this dispute—the enforceability of arbitration clauses—also supports the writ. The sheer number of alternative-dispute cases, as an initial matter, makes arbitration-related issues of this magnitude uniquely essential to resolve. By definition, such disputes affect large numbers of people and large amounts of money. And by definition, any ambiguity about the scope of federal preemption of state law arbitration exceptions leads to litigation that it is the essential purpose of the FAA to circumscribe.

Nor may these concerns lightly be dismissed. Arbitration remains the primary device for resolving disputes arising from securities transactions, securities-industry employment, collective bargaining agreements and international commercial transactions. *See, e.g.*, NASD Code of Arbitration Rule 10101; 9 U.S.C. § 301. It also continues to be a pivotal device for resolving controversies between domestic commercial enterprises, between landlords and contractors, and between many non-unionized employees and their employers. If left to stand or, worse, if embraced by other courts, the decision in this case will spawn protracted litigation over the question of arbitrability itself—a particularly pointless exercise given the

clarity of traditional arbitration clauses of this type—and may well jeopardize this method of dispute resolution in many settings.

The growing tension between federal and state courts over the existence of an intentional-tort exception to the FAA, moreover, only compounds these problems. In this case, as in many others like it, the parties have pursued parallel proceedings in state and federal court—with the plaintiff racing to state court to obtain an intentional tort judgment and with the defendant racing to federal court to enforce the arbitration agreement signed by the parties. This takes an already-inefficient situation—apparent uncertainty over the FAA's application to intentional torts—and doubles the inefficiency by clogging two dockets with expedited proceedings designed to get a single result regarding a single dispute. *See, e.g., Cohen v. PaineWebber, Inc.*, 6th Cir. Case No. 01-3228, *petition for cert. filed*, No. 01-1665. Conceived as a device to avoid litigation, arbitration clauses in these situations have become handmaidens of "prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984). Surely this is not alternative dispute resolution at its best, and it assuredly is not the national arbitration policy that Congress set in motion by enacting the FAA.

As this dispute well illustrates, the conflict in the lower courts over these issues also has generated uncertainty even for residents of the same State. Residents of Florida and Alabama must grapple with disparate precedents from the Eleventh Circuit on the one hand and the Florida and Alabama Supreme Courts on the other regarding the arbitrability of an intentional-tort claim. And the same is now true for litigants in Ohio in view of the lower-court decisions in this case and the existing Sixth Circuit authority rejecting the claim that an intentional-tort exception to the FAA exists. Because no one litigant and the residents of no one State should have to face

such unpredictable consequences stemming from the same dispute, this factor by itself supports the writ.

If the Ohio decision stands, moreover, the enforceability of an arbitration agreement also would turn, anomalously, on the creativity of the party's lawyer. By simply crafting the dispute as one sounding in tort or intentional tort, a litigant could remove the claim from the once-ample realm of traditional arbitration agreements. Worse, the artificial distinction between claims that are pleaded as intentional torts and those that are not will lead to claim-splitting, with some causes decided by arbitration while other issues in the very same case—and likely involving the very same facts—being decided in the court system by a jury.

One final point deserves mention. As noted above, the Court has issued several decisions in the last fifteen years making it clear that the FAA preempts state *statutes* that undermine the National Government's policy in favor of arbitration. What it has not done and what presumably led to the confusion that generated these lower-court decisions is clarify that the FAA equally preempts state *common-law* doctrines that come to the same thing—namely, undermine or conflict with Congress's effort to protect the enforceability of traditional arbitration clauses. The Court faced a similar dilemma ten years ago in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). There the question was whether the federal statute preempted state common-law, as opposed to state statutory, claims. For many of the same reasons that the Court concluded that the *Cipollone* statute preempted state statutory *and* state common-law claims, it should reach a similar conclusion here.

In the last analysis, this petition squarely raises a compelling federal question arising from the latest state attempt to excuse litigants from the deeply-embedded federal policy in favor of arbitration. The case should be reviewed on the merits or at a minimum it should be summarily reversed.

CONCLUSION

The petition for a writ of certiorari should be granted, or at a minimum the decision below should be summarily reversed.

Respectfully submitted,

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August 2002

APPENDIX

[Filed 5/15/02]

The Supreme Court of Ohio

Alfred Cohen, Executor of the Estate of Samuel Ginsburg, Appellee,	:	Case No. 02-375
v.	:	
[UBS] PaineWebber, Inc., and Richard Wilhelm, Appellants.	:	ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Jones, Day, Reavis & Pogue.

(Hamilton County Court of Appeals; No. C010312)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ALFRED COHEN	APPEAL NO. C-010312
Appellee,	
	ENTRY OVERRULING MOTION TO CERTIFY AND OVERRULING MOTION TO CONTINUE STAY
PAINEWEBBER INCORPORATED, et al.	
Appellants,	

This cause came on to be considered upon the motion of the appellants filed herein to certify the Ohio Supreme as a conflict and the motion of the appellants to continue the stay pending an appeal to the Ohio Supreme Court and upon the responses thereto, and

The Court, upon consideration thereof, finds that the motions are not well taken and are overruled.

To The Clerk:

Enter upon the Journal of the Court on 2/22/02 per order of the Court.

By: /s/ Gorman, J.
Acting Presiding Judge

Case No. C-010312

ALFRED COHEN EXEVUTOR [sic] OF
EST OF SAMUAL [sic] GINSBURG
- vs -
PAINEWEBBER INCORPORATED

HAMILTON COUNTY CLERK OF COURTS
230 EAST NINTH ST ROOM 12100
CINCINNATI OH 45202

IN ACCORDANCE WITH APPELLATE RULE 30(A), YOU ARE HEREBY GIVEN NOTICE THAT THE FOLLOWING ORDER OR JUDGMENT HAS BEEN JOURNALIZED ON THE 18TH OF JANUARY, 2002, IMAGE NUMBER 93.

JUDGMENT ENTRY AFFIRMING JUDGMENT OF TRIAL COURT (A-0004567). NOTICE IS SENT BY ORDINARY MAIL TO ALL PARTIES REQUIRED BY LAW.

Deputy: SHERRY SIBERT
JAMES CISSELL - Clerk of Courts

[Presented to the Clerk of Courts for Filing 1/18/02]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ALFRED COHEN, Executor of the Estate of Samuel Ginsburg,	:	APPEAL NO. C-010312 TRIAL NO. A-0004567
Plaintiff-Appellee,	:	*DECISION.*
vs.	:	
PAINEWEBBER, INC.,	:	
and	:	
RICHARD WILHELM,	:	
Defendants-Appellants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas
Judgment Appealed From Is: Affirmed
Date of Judgment Entry on Appeal: January 18, 2002

Waite, Schneider, Bayless & Chesley Co., L.P.A., Stanley M. Chesley, Terrence L. Goodman, Barrett & Weber, L.P.A., and *Michael R. Barrett*, for Plaintiff-Appellee,

Jones, Day, Reavis & Pogue, Jeffrey J. Jones, and *Douglas M. Mansfield*, for Defendants-Appellants.

Please Note: We have *sua sponte* removed this case from the accelerated calendar.
Per Curiam.

Defendants-appellants PaineWebber, Inc., and Richard Wilhelm appeal the trial court's order denying their motion to stay proceedings and their motion to compel arbitration pursuant to the agreement signed by plaintiff-appellee Alfred Cohen's deceased, Samuel Ginsburg, and PaineWebber. Upon our conclusion that the arbitration agreement did not cover claims that essentially alleged theft, we affirm the judgment of the trial court.

The record transmitted to this court demonstrates the following facts. PaineWebber is an investment firm based in Delaware with an office in downtown Cincinnati. Richard Wilhelm, at all times relevant to this dispute, was the manager of PaineWebber's Cincinnati office. Wilhelm's duties included supervising and monitoring all employees and accounts in the Cincinnati office. PaineWebber employed Richard Zenni as a registered securities broker for its Cincinnati office from 1992 to 1999. Zenni, through bankruptcy-court filings, has allegedly admitted to stealing millions of dollars from PaineWebber's elderly investors, which included Samuel Ginsburg.

Ginsburg opened a PaineWebber account with Zenni in August 1992, and, at that time, Ginsburg executed an account application and a client's agreement that included an arbitration clause. The arbitration agreement provided, in part, as follows:

> I agree, and by carrying an account for me PaineWebber agrees, that any and all controversies which may arise between me and PaineWebber concerning any account, transaction, dispute or the construction, performance, or breach of this or any other agreement, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration. Any arbitration under this agreement shall be held under and pursuant to and be governed by the Federal Arbitration Act * * *.

There is not dispute that Ginsburg signed the agreement containing this arbitration provision, and that Ginsburg's heirs and executors are also bound by the agreement.

Ginsburg died on October 9, 1999. Shortly after his death, it was discovered that over one million dollars had been stolen from his PaineWebber account. On July 26, 2000, Alfred Cohen, in his capacity as the executor of Ginsburg's estate, filed a complaint in the Hamilton County Court of Common Pleas against PaineWebber and Wilhelm, alleging unlawful conversion and fraudulent concealment. Specifically, Cohen alleged that PaineWebber and Wilhelm had aided and abetted Zenni in stealing money from Ginsburg. On July 28, 2000, PaineWebber filed a petition in the United States District Court for the Southern District of Ohio, seeking to compel arbitration and to stay the civil action. Cohen contested the federal district court's jurisdiction to stay the civil proceedings and compel arbitration, arguing that Wilhelm was a necessary and indispensable party to the lawsuit, and that once Wilhelm was joined as a party, the district court's diversity jurisdiction would be defeated. The district court agreed and dismissed PaineWebber's petition. That decision is currently on appeal to the United States Court of Appeals for the Sixth Circuit.

In response to the complaint filed by Cohen in the Hamilton County Court of Common Pleas, PaineWebber and Wilhelm moved for a stay of the action and an order compelling arbitration pursuant to the agreement signed by Ginsburg and PaineWebber. The trial court denied this motion, and this timely appeal followed.[1]

In their sole assignment of error, PaineWebber and Wilhelm assert that the trial court erred in denying their motion for a

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[1] Pursuant to R.C. 2711.02(C), an order that denies a stay of the trial of any action pending arbitration is a final order that may be appealed.

stay of the proceedings pending arbitration. We are unpersuaded.

An appellate court reviews the denial of a stay of proceedings pending arbitration under an abuse-of-discretion standard.[2] An abuse of discretion contemplates more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary or unconscionable.[3] The Ohio Supreme Court has adopted four rules, common to both state and federal courts, for reviewing a decision concerning a dispute's "arbitrability": (1) that "'arbitration is a matter of contract and a party cannot be required to so submit to arbitration any dispute which he has not agreed to so submit"; (2) that the question whether a particular claim is arbitrable is one of law for the court to decide; (3) that, when deciding whether the parties have agreed to submit a particular claim to arbitration, a court may not rule on the potential merits of the underlying claim; and (4) that, when a "contract contains an arbitration provision, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'"[4]

Here, the parties' dispute centers on whether the claims alleging fraudulent concealment and unlawful conversion are arbitrable. We note that the trial court denied the stay pending

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[2] See *Harsco v. Crane Carrier Co.* (1997), 122 Ohio App. 3d 406, 410, 701 N.E.2d 1040, 1043.

[3] See *id.*

[4] *Council of Smaller Enterprises v. Gates, McDonald & Co.* (1998), 80 Ohio St. 3d 661, 665-666, 687 N.E.2d 1352, 1355, citing *AT & T Technologies, Inc. v. Communications Workers of Am.* (1986), 475 U.S. 643, 648-650, quoting *Steelworkers v. Am. Mfg. Co.* (1960), 363 U.S. 564; *Steelworkers v. Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574; and *Steelworkers v. Enterprise Wheel & Car Corp.* (1960), 363 U.S. 593.

arbitration without opinion. But because there is no dispute as to whether a valid arbitration provision existed within the contract, we may presume that the trial court based its decision on the premise that the fraudulent-concealment and unlawful-conversion claims were not subject to the arbitration provision contained in the contract. As the arbitrability of a claim is a question of law for the trial court, we review the issue of the arbitrability of the specific claims *de novo*.[5]

It has been held that the resolution of the question "[w]hether a claim falls within the scope of an arbitration agreement turns on the factual allegations in the complaint rather than on the legal causes of action asserted."[6] Here, the facts underpinning the unlawful-conversion claim are the same facts offered to support the claim of fraudulent concealment. In the complaint, Cohen alleged that Wilhelm and PaineWebber had had direct notice of, and thus knowledge of, Zenni's conduct because of the obvious pattern of risky and questionable trades made by Zenni on behalf of Ginsburg, and because of the numerous accounts opened in Ginsburg's name when only one account would have sufficed. Cohen also alleged that PaineWebber and Wilhelm had encouraged Zenni to befriend elderly investors, and that Wilhelm and PaineWebber had chosen to disregard their knowledge of Zenni's conduct and had failed to notify their elderly investors, including Ginsburg, of the theft. These facts essentially alleged a form of theft, *i.e.*, that PaineWebber and Wilhelm had "aided and abetted" Zenni in stealing Ginsburg's money.

Although the arbitration provision is broad, stating that it covers "any and all controversies" pertaining to the brokerage

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[5] See *Marchese v. Shearson Hayden Stone, Inc.* (C.A.9, 1984), 734 F. 2d 414, 423.

[6] *Duryee v. Rogers* (Sept. 23, 1999), Franklin App. Nos. 98-AP-1255 and 98-AP-1256, unreported.

account, we cannot say, as a matter of law, that a claim alleging such tortious conduct as the "aiding and abetting" of a theft is subject to the arbitration provision here. An arbitration clause itself is a contract. A contract requires a "meeting of the minds" as to the terms contained within. At the time that the parties entered into the contract, there was no meeting of the minds that the arbitration provision would cover claims alleging tortious forms of theft. If the parties had contemplated, at the time that they entered into the arbitration agreement, that PaineWebber would possibly steal from Ginsburg, that would surely be against public policy. Matters more likely to have been contemplated by both parties would have involved questions of whether a particular transaction was authorized or whether there was any miscalculation in the sum of money contained in the account. Here, the claims filed by Cohen alleged that PaineWebber and Wilhelm had engaged in conduct beyond the scope of the brokerage agreement. Zenni, allegedly with the knowledge of PaineWebber and Wilhelm, had sent altered and false monthly account statements to Ginsburg. Accordingly, under the stated circumstances in this case, we hold that, as a matter of law, the claims of unlawful conversion and fraudulent concealment, were not subject to the arbitration provision.

As the claims alleged here, by the facts in the complaint, were not subject to the arbitration provision, the trial court did not abuse its discretion in denying the motion of PaineWebber and Wilhelm to stay the proceedings and to compel arbitration. The sole assignment of error is overruled, and we affirm the judgment of the court below.

Judgment affirmed.

DOAN, P.J., WINKLER and SHANNON, JJ.

RAYMOND E. SHANNON, retired, from the First Appellate District, sitting by assignment.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Decision.

[Entered 4/25/01]

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ALFRED M. COHEN, Executor of the Estate of Samuel Ginsburg Plaintiff, v. **PAINEWEBBER INCORPORATED, et al.** Defendants.	:	Case No. A0004567 Judge Robert Ruehlman

ORDER AND ENTRY DENYING DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING ARBITRATION

The Defendants' Motion to Stay Proceedings Pending Arbitration came on for a hearing before the Court on April 5, 2001. Based on the arguments of counsel and the briefs, the Court finds that the request to vacate the current schedule is moot in that the Court previously vacated the schedule by entry dated February 26, 2001. The Court further finds that the request to stay proceedings pending arbitration is not well taken.

IT IS ORDERED AND ADJUDGED that Defendants' Motion to Vacate the Current schedule is moot and that the Court will establish a new schedule including a trial date at the April 25, 2001 conference and that the Defendants' Motion to Stay Proceedings Pending Arbitration is denied.

/s/ Robert Ruehlman
Judge Robert Ruehlman

SEP 16 2002
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No. 02-247

In the Supreme Court of the United States

UBS PAINEWEBBER INC. AND RICHARD WILHELM,
Petitioners,

v.

ALFRED M. COHEN,
EXECUTOR OF THE ESTATE OF SAMUEL GINSBURG,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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23 pp

QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, requires the enforcement of an arbitration clause that does not cover theft?

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STATEMENT

The Respondent, Alfred Cohen is the executor of the estate of Samuel Ginsburg. Petitioner, UBS PaineWebber, Inc ("PaineWebber") provides investment planning. The investment planning includes recommendations regarding the purchase and sale of stock and portfolio management. Petitioner Richard Wilhelm ("Wilhelm") is the manager of PaineWebber's Cincinnati, Ohio office. As the manager of the Cincinnati office, Wilhelm accepted the responsibility to supervise each broker in his Office and each account in the Cincinnati office.

In August of 1992, PaineWebber broker Richard Zenni encouraged Samuel Ginsburg to open a PaineWebber account. When he opened his account, Samuel Ginsburg was 78 years old. As a condition of opening his account, Samuel Ginsburg executed several complex and standard documents. Some of the executed documents include generic language regarding arbitration. The generic arbitration language does not, however, mention or refer to claims involving theft.

Richard Zenni, as an employee of PaineWebber and under the direct supervision of Richard Wilhelm, admits to stealing millions of dollars from elderly investors including Samuel Ginsburg. The Respondent alleges that PaineWebber and Richard Wilhelm participated in the theft by encouraging Zenni to befriend elderly investors, by recklessly failing to monitor Zenni's criminal conduct, and by failing to monitor Mr. Ginsburg's accounts.

After learning of the theft, the executor of Samuel Ginsburg's estate, Alfred Cohen initiated this action by filing a complaint against PaineWebber Inc. and Richard Wilhelm in the Hamilton County Ohio Court of Common Pleas. In the complaint, the Petitioner alleged that PaineWebber and Richard Wilhelm participated in the admitted theft from Samuel Ginsburg and are liable under theories of conversion and fraudulent concealment.

On January 12, 2001, PaineWebber and Wilhelm sought an order from the Hamilton County Court of Common Pleas to compel the Estate to arbitrate its claims against the Petitioners. The trial court, after briefing and oral argument denied the motion.

The Petitioners appealed the ruling to Ohio's First District Court of Appeals. On January 18, 2002, the First District issued its Decision denying the Petitioners' motions to compel arbitration and stay of state court proceedings. In its Opinion, the First District Court of Appeals conducted a de novo review and held that as a matter of contract law the parties did not contemplate arbitrating the claims arising from theft.

The Petitioners, after the Ohio First District Court of Appeals affirmed the trial court, filed a motion to certify an alleged conflict and stay state court proceedings to the First District Court of Appeals. The First District Court of Appeals denied the motion to certify a conflict on February 22, 2002. The Petitioners subsequently filed an appeal to the Supreme Court of Ohio. On May 15, 2002, the Ohio Supreme Court refused to hear the appeal.

REASONS FOR DENYING THE WRIT

This matter does not involve novel or unresolved issues regarding how the courts should apply and interpret the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* Nor, does this matter involve a split among the various courts regarding the application of the Federal Arbitration Act. To the contrary, this matter merely involves traditional and accepted principles of contact interpretation. As to an alleged split among the courts whether the Federal Arbitration Act requires the arbitration of theft claims, the Petitioners fail to cite a single authority that holds that theft must be arbitrated under the FAA. The lack of division of authority in itself is a reason to deny the petition.

I. The Hamilton County Court of Appeals decision interprets established and routine principles of contract law.

Despite the pleas of the Petitioner to the contrary, the mere incantation of "arbitration agreement" does not mean that the parties are required to arbitrate all disputes. When deciding whether the parties agreed to arbitrate, the Federal Arbitration Act requires both state and federal courts to apply traditional principles that govern the formation of contracts. *First Options of Chicago, Inc v. Kaplan,*, 514 U.S. 938, 943, 115 S. Ct. 1920, 1924 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60-61, 115 S. Ct. 1212, 1218-1219 (1995); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University,* 489 U.S. 468, 474-475, 109 S. Ct. 1248, 1253-1254 (1989). Federal courts

must use state law principles of contract formation. *First Options of Chicago, Inc v. Kaplan,* 514 U.S. 938, 944, 115 S. Ct. 1920, 1924 (1995); *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 662 (7th Cir. 2002). These established principles require a court to determine whether the dispute falls within the arbitration clause before issuing an order compelling arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 3387 (1985); *Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir. 2000), *cert denied*, 121 S.Ct. 1088 (2001). This approach is consistent with the requirements of the Federal Arbitration Act.

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4.

Furthermore, traditional principles of contract law along with the Federal Arbitration Act clearly establish that a court can not compel arbitration if the parties to the arbitration agreement did not contemplate arbitrating the particular claim. *See Sandvik AB v. Advent International Corp.*, 220 F.3d 99, 105 (3d Cir. 2000); *Roney & Co. v. Kassab*, 981 F.2d 894, 897 (6th Cir. 1992); *Three Valleys Municipal Water District v. E.F. Hutton & Company, Inc.*, 925 F.2d 1136 (9th Cir. 1991); *Leadertex, Inc. v. Morganton Dyeing & Fishing Corp.*, 67 F.3d 20, 27 (2d Cir. 1995). Thus, the

Petitioners are wrong to rely primarily on the favored status of arbitration as the basis to secure this Court's review of an Ohio Appellate Court decision.

Although the First Appellate District recognized that the law favors arbitration, the First Appellate District also considered the need to apply contract law. Accordingly, Ohio's First Appellate District carefully examined the unique circumstances involved in this case and applied traditional notions of contract law. After performing its analysis the court held that the arbitration provision did not apply to the theft claims alleged in the Respondent's complaint.

> In the complaint, Cohen alleged that Wilhelm and PaineWebber had had direct notice of, and thus knowledge of, Zenni's conduct because of the obvious pattern of risky and questionable trades made by Zenni on behalf of Ginsburg, and because of the numerous accounts opened in Ginsburg's name when only one account would have sufficed. Cohen also alleged that PaineWebber and Wilhelm had encouraged Zenni to befriend elderly investors, and that Wilhelm and PaineWebber had chosen to disregard their knowledge of Zenni's conduct and had failed to notify their elderly investors, including Ginsburg, of the theft. These facts essentially alleged a form of theft, *i.e.*, that PaineWebber and Wilhelm had "aided and abetted" Zenni in stealing Ginsburg's money.

Alfred Cohen, Executor of the Estate of Samuel Ginsburg v. PaineWebber, Incorporated, APPEAL NO. C-010312, TRIAL NO. A-0004567, (Hamilton County, January 18, 2002) at 5.

The First District, in reaching its decision, appropriately applied contract law to the allegations in the complaint to determine that the parties had failed to reach a meeting of the minds to arbitrate claims involving theft.

> Although the arbitration provision is broad, stating that it covers "any and all controversies" pertaining to the brokerage account, we cannot say, ***as a matter of law***, that a claim alleging such tortious conduct as the "aiding and abetting" of a theft is subject to the arbitration provision here. An arbitration clause itself is a contract. A contract requires a "meeting of the minds" as to the terms contained within. At the time that the parties entered into the contract, ***there was no meeting of the minds that the arbitration provision would cover claims alleging tortious forms of theft.***

Id at 5-6.

The First District's reasoning, based on the record before it, reflects the appropriate approach that a court should pursue when determining whether a claim is subject to arbitration. The First District's decision does not establish disrespect for the Federal Arbitration Act. The First District's decision demonstrates, based on the record, that the Petitioner

failed to establish that the parties agreed to arbitrate theft claims. *Nilavar v. Osborn*, (1998), 127 Ohio App.3d 1, 11, 711 N.E.2d 726, 732-733. "In order to declare the existence of a contract, both parties to the contract must consent to its terms; there must be a meeting of the minds of both parties; and the contract must be definite and certain." *Episcopal Retirement Homes, Inc. v. Ohio Department of Industrial Relations*, (1991), 61 Ohio St.3d 366, 369, 575 N.E.2d 134, 137. Here, the Petitioners failed to meet their burden.

In light of the record, the First Appellate District appropriately held, the arbitration agreement did not apply because a "meeting of the minds" did not exist and because of the specific and unique circumstance of this case. The First Appellant District did not hold as a matter of public policy that arbitration can not apply to claims involving the trading of securities.

The Petitioners ignore the clear wording of the decision and criticize the First Appellate District. The purpose of this criticism is to secure a change in the manner that courts use to determine whether a claim is subject to arbitration. The Petitioners, through this Petition, seek to enlarge any arbitration arrangement so that that the agreement encompasses any and all claims even if the parties did not intend to include the claims within the net of arbitration. The Petitioners hope to prevent courts from inquiring whether the parties reached a meeting of the minds to include the subject claims within the net of arbitration. The Petitioners' approach ignores the traditional requirement of contract formation and interpretation and would result in a fundamental change in the application of the Federal Arbitration Act.

II. The Petitioners fail to cite a single case establishing a conflict exists among the circuits, federal courts, or state courts.

The Petitioner suggests that this Court should review this matter because an alleged judicial conflict exists regarding how Courts interpret and apply the Federal Arbitration Act. In their quest to create a conflict, the Petitioners cite to numerous cases from various jurisdictions. Interestingly, however, none of the cited cases involve the issue presented by this case: whether the parties had a meeting of the minds to arbitrate claims involving theft.

A review of the federal cases cited by the Petitioners reflects that these cases involve a variety of issues including defamation and claims for emotional distress. None of the cases, however, involve the issue in this case regarding the intent of the parties to arbitrate claims involving theft. *See Long v. Silver,* 248 F.3d 309 (4th Cir.) *cert. denied,* 122 S. Ct. 213 (2001) (Arbitration involving defamation), *Coudert v. PaineWebber Jackson & Curtis,* 705 F.2d 78, 81-82 (2d Cir. 1983) (Arbitration involving intentional infliction of emotional distress), *Aspero v. Shearson American Express, Inc.,* 768 F.2d 106, 107 (6th Cir. 1985) (Arbitration involving defamation, invasion of privacy, and intentional infliction of emotional distress), *Wood v. Prudential Ins. Co. of America,* F.3d 674, 681 (3d Cir. 2000) (Arbitration involving defamation and intentional infliction of emotional distress). These cases hardly demonstrate a split among the federal courts regarding the unique arbitration issue presented in this case.

The closest the Petitioners come to establishing a "conflict" is their citations of cases involving fraud and conversion. *See Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382 (11th Cir. 1996); *Kerr-McGee Ref. Corp. v. M/T Triumph*, 924 F.2d 467, 468, 469 (2d Cir. 1991); *Marchese v. Shearson Hayden Stone, Inc.*, 734 F.2d 414, 419 (9th Cir. 1984). These cases, however, are not relevant because they failed to examine whether the parties had a meeting of the minds to arbitrate theft claims. In fact, the Eleventh Circuit Court of Appeals, in *Gregory*, recognized that certain disputes may not be subject to arbitration. *Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382, 385.

The Petitioners also seek to create a conflict by referring to selected state cases. The Petitioner, for example, cites *Hirschfeld Prods v. Mirvish*, 673 N.E.2d 1232, 1233 (N.Y. 1996) (Arbitration involving tortious interference and breach of fiduciary duty). This case, similar to the federal cases, does not involve theft and the parties intent to arbitrate theft claims.

Finally, the Petitioners attempt to create the appearance of a conflict by citing two state cases that allegedly disfavor arbitration. However, neither of these cases examines contract formation and theft. *Seifert v. U.S. Home Corp.* 750 So. 2d 633 (Fla. 1999) (Arbitration involving wrongful death); *Ex Parte Discount Foods Inc.*, 711 So. 2d 992 (Ala.), *cert. Denied sub nom. Supervalu Inc. v. Discount Foods, Inc.*, 525 U.S. 825 (1998), *reconsidered in part* 789 So. 2d 842 (2001) (Arbitration involving tortious interference with contract, unfair competition, and violation of trade secret laws.). When the Alabama Supreme Court reconsidered its plurality opinion in *Discount Foods*, moreover, the Alabama Supreme Court essentially

reversed itself regarding any unfavor that it may have toward arbitration. *Ex Parte Discount Foods Inc.*, 789 So. 2d 842 (2001). Accordingly, the cases cited by the Petitioner fail to establish any meaningful conflict among the courts regarding how to apply and interpret the Federal Arbitration Act.

The lack of a conflict is highlighted by the fact that a United States District Court has recognized that the First District decision is unique and novel. Thus, a conflict can not exist. In a recent federal court decision, the United States District Court for the Northern District of Ohio found the First District opinion was the only reported decision that has examined whether a party entered into an arbitration agreement intending to arbitrate theft claims. In *Fazio v. Lehman Brothers*, 2002 U.S. Dist. LEXIS 15174 (N.D. Ohio July 19, 2002)[Respondent's Exhibit 1 at 1a] the district court determined:

> Cohen (the First District's decision) is the only case cited by the parties in which tort claims were brought based upon broker theft. In other contexts, however, Courts have considered the broader issue of whether tortious conduct is within the scope of broad, contractual arbitration clauses. Thus, Cohen, is not aberration, but merely constitutes one example of the broader issue of applying contractual arbitration clauses to tort claims.

Fazio v. Lehman Brothers, 2002 U.S. Dist. LEXIS 15174 (N.D. Ohio July 19, 2002)[Respondent's Exhibit 1 at 1a].

As the United States District Court for the Northern District of Ohio found, the First District's decision involves a unique and novel analysis of contract formation and theft. Thus, a conflict can not exist among the United States Circuit Courts of Appeal, or among the various state judiciaries. If this Court chooses to review this issue, this Court should permit decisions from other circuits, federal courts, or state courts to surface regarding this issue.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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RESPONDENTS APPENDIX 1

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

CASE NO. 1:02CV157, CASE NO. 1:02CV370,
CASE NO. 1:02CV382, CASE NO. 1:02CV761,
CASE NO. 1:02CV764, CASE NO. 1:02CV968,
CASE NO. 1:02CV1018

July 19, 2002, Decided

ROBERT FAZIO, et al.,
Plaintiffs,
vs.
LEHMAN BROTHERS, INC., et al.,
Defendants.

SAMUEL GLAZER,
Plaintiff,
vs.
LEHMAN BROTHERS, INC., et al.,
Defendants.

DOMINIC A. VISCONSI, et al.,
Plaintiff,
vs.
LEHMAN BROTHERS, INC., et al.,
Defendants.

PETER A. SPITALIERI, et al.,)
Plaintiff,)
vs.)
LEHMAN BROTHERS, INC., et al.,)
Defendants.)
)
RICHARD LOPARDO, et al.,)
Plaintiff,)
vs.)
LEHMAN BROTHERS, INC., et al.,)
Defendants.)
)
THOMAS J. SAVOCA, et al.,)
Plaintiff,)
vs.)
LEHMAN BROTHERS, INC., et al.,)
Defendants.)
)
PETER M. BONUTTI,)
Plaintiff,)
vs.)
LEHMAN BROTHERS, INC., et al.,)
Defendants.)
_____)

DISPOSITION

Defendants' motions to compel arbitration and stay proceedings denied.

MEMORANDUM OF OPINION

In each of these cases, the Defendants have filed motions to compel arbitration and stay proceedings.[1] (See Fazio Docket Nos. 38, 48 and 54; Glazer Docket Nos. 26 and 36; Visconsi Docket Nos. 23 and 35; Spitalieri Docket Nos. 11 and 12; Lopardo Docket Nos. 13 and 17; Savoca Docket Nos. 12 and 16; Bonutti Docket No. 13.) The parties have briefed these issues extensively. The arbitration issues overlap sufficiently to permit the Court to issue a single opinion applicable to all these cases.

For the following reasons, the motions to compel arbitration and stay proceedings are DENIED.[2]

I. FACTS

These actions arise out of the conduct of Frank Gruttadauria, who formerly acted as an investment broker for each of the Plaintiffs. He is charged with stealing from the investment accounts he was servicing over a period of approximately fifteen years, and covering up his activity by providing false account statements to the Plaintiffs.

The Plaintiffs have sued the brokerage firms for which Gruttadauria worked over the period of the alleged theft. Generally, the Plaintiffs assert that the brokerages are liable for his conduct. They have

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[1] For convenience, the Court will refer to each case by the last name of the first Plaintiff.

[2] Some of these motions also seek dismissal of certain claims pursuant to Fed. R. Civ. P. 12(b)(6). These issues will be addressed in separate opinions.

brought fraud claims under the federal securities laws, including Section 10(b) of the Securities and Exchange Act of 1934 (15 U.S.C. § 78j(b)) and S.E.C. Rule 10(b)(5), as well as related claims under state law.

Viewing the cases collectively, the brokerage defendants include Lehman Brothers, Inc. and certain affiliated companies (collectively "Lehman"); SG Cowen Securities Corp., its predecessor Cowen & Company, and its parent Societe Generale (collectively "SG Cowen"); and Hambrecht & Quist, Inc., now known as J.P. Morgan Securities, Inc., and its parent J.P. Morgan Chase & Co. (collectively "J.P. Morgan").

The Defendants allege that the Plaintiffs executed various agreements governing their brokerage accounts. These agreements were presented to the Plaintiffs in connection with the accounts to be serviced by Gruttadauria, and allegedly require that all disputes arising out of account activity be resolved through arbitration. The agreement allegedly executed between Plaintiff Robert Fazio and S.G. Cowen's predecessor is representative:

> Any controversy arising out of or relating to any of [Fazio's] accounts, to transactions with [Cowen] for [Fazio's], or to this or any other agreement or the construction, performance or breach thereof, shall be settled by arbitration before an arbitration panel appointed by the NASD or the New York Stock Exchange, Inc. or the American Stock Exchange, Inc. as [Fazio] may elect.

(See Motion of SG Cowen, Fazio Docket No. 38, at 3.)

Although there may be minor differences among the agreements signed by the various Plaintiffs, they all contain an arbitration provision comparable to that quoted above.

The Defendants assert that the arbitration provisions govern all issues raised in these cases. They, therefore, seek a stay of all court proceedings and an order compelling the Plaintiffs to submit to arbitration. The Plaintiffs essentially argue that the arbitration provisions should not be enforced because Gruttadauria's conduct was far outside the contemplation and foreseeability of the parties at the time the account agreements were executed.

II. LAW AND ANALYSIS

The Federal Arbitration Act ("FAA") provides in relevant part:

> A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Once a court determines that issues in litigation are subject to arbitration, the court

proceedings must be stayed until the arbitration process is complete. 9 U.S.C. § 3.

Courts have characterized the FAA as expressing a congressional policy favoring enforcement of arbitration provisions. Doubts regarding such provisions should be resolved in favor of arbitration. *Southland Corp. v. Keating*, 465 U.S. 1, 10-13, 79 L. Ed. 2d 1, 104 S. Ct. 852 (1984); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983) These principles apply to arbitration provisions contained in agreements governing brokerage accounts. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-83, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-21, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985); *Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir. 2000), cert. denied, 531 U.S. 1148, 121 S. Ct. 1088, 148 L. Ed. 2d 963 (2001); *Ferro Corp. v. Garrison Industries, Inc.*, 142 F.3d 926, 932 (6th Cir. 1998).

Enforcement of an arbitration clause, however, has limits. First, the dispute at issue must be within the scope of the arbitration provision. *Stout*, 228 F.3d at 714. A party cannot be forced to arbitrate issues for which there was not an agreement to do so, and the parties intentions control. *Sandvik AB v. Advent International Corp.*, 220 F.3d 99, 105 (3d Cir. 2000); *Leadertex, Inc. v. Morganton Dyeing & Fishing Corp.*, 67 F.3d 20, 27 (2d Cir. 1995); *Three Valleys Municipal Water District v. E.F. Hutton & Company, Inc.*, 925 F.2d 1136 (9th Cir. 1991); *Roney & Co. v. Kassab*, 981 F.2d 894, 897 (6th Cir. 1992). In addition, an arbitration

provision will not be enforced if it resulted from conduct that would provide for revocation of the contract. *McMahon*, 482 U.S. at 226; Ferro, 142 F.3d at 932.

In support of arbitration, the Defendants rely on a body of cases beginning with *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967). Prima Paint dealt with a situation in which the party opposing arbitration alleged fraudulent inducement to enter the contract. The Supreme Court held that if the alleged fraud pertains to the contract *as a whole*, then the issue of fraudulent inducement must be decided as part of the arbitration process. On the other hand, a fraud claim should be decided by the court if the alleged fraudulent inducement is directed at the agreement to arbitrate *specifically*. In essence, the alleged agreement to arbitrate is effectively considered a separate agreement which may be valid despite being contained in an otherwise fraudulently induced contract. *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 403-04, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967); see also *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483, 488 (6th Cir. 2001), *cert. denied*, 152 L. Ed. 2d 380, 122 S. Ct. 1436 (2002); *Ferro*, 142 F.3d at 931, 933.

As shown in the cases cited by the parties, Prima Paint has been applied generally to challenges based upon the making of the contract. The analysis proceeds upon the following principles. First, there must be a valid and enforceable contract which includes an obligation to arbitrate disputes. Second, the scope of the arbitration obligation must include the dispute at issue. Third, if the claim is for fraudulent

inducement to enter the agreement as a whole, then the disputed issues must be decided by arbitration. If, however, the claim is for fraudulent inducement of the agreement to arbitrate, then the disputed issues are for the Court to decide because the alleged fraud goes to the very legitimacy of the arbitration procedure.

The Court concludes that the Defendants have misapplied Prima Paint and its progeny. Those cases apply only to situations in which a party seeks to avoid or rescind an existing contract. It does not apply to challenges to the very existence of the contract on the ground that there was never an agreement at all. *Three Valleys,* 925 F.2d at 1140-41 (whether a contract's signatory had authority to bind a party is a question for the court); *Sandvik,* 220 F.3d at 106 (court must decide whether the underlying agreement containing the arbitration clause exists). An arbitration obligation cannot arise out of a broader contract if the broader contract never existed. *Burden,* 267 F.3d at 488. To avoid arbitration based on the ground that a contract never actually existed, the substance of any alleged misrepresentation must go to its character or essential terms. *Id.* at 490, citing, Restatement (Second) of Contracts § 163 cmt. a (1979).

Here, assuming the Plaintiffs executed the account agreements, they did so with the understanding and expectation that Gruttadauria would act as their broker. He allegedly, however, never had any intention to do so, but rather only intended to steal their money. Because the intentions of the parties differed drastically, there was never any meeting of the minds, both as to the contract as a whole, *and as to the arbitration clause specifically.* Thus, an enforceable contract never existed. In Prima Paint, the alleged

fraud centered around the circumstances under which the contract was executed. In contrast, in the current cases the alleged fraud goes beyond just the execution of the account agreements, but goes to the very nature of the relationship. Under the Plaintiffs' allegations, there never really was a broker/investor relationship, so the account agreements are entirely void *ab initio*, including the arbitration provisions.

In this vein, several of the Plaintiffs note that the arbitration provisions relate only to "accounts". They argue that those provisions do not apply because there never were any "accounts" as that term is understood in the brokerage industry. The Court agrees. The plain meaning of "account" in this context is essentially a pool of assets either invested or maintained by the brokerage in cash accounts. Here, the Plaintiffs' assets for the most part were neither invested nor maintained as cash, but stolen. Accordingly, there effectively were no accounts, and the alleged agreements are therefore unenforceable against the Plaintiffs.[3]

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[3] The Court recognizes that many of the Plaintiffs make additional arguments as to why particular account agreements are invalid. Such arguments include, for example, that certain account agreements were never signed, that signatures were actually forged, and/or that the agreements pertain to accounts or transaction categories not at issue. If demonstrated, these arguments would provide additional bases for concluding that the arbitration provisions are invalid and unenforceable. Because the general principles governing contracts and arbitration clauses render the provisions at issue ineffective, the Court need not address each and every specific argument raised by the Plaintiffs.

Even assuming the existence of valid account agreements, Prima Paint and its progeny still do not apply because such cases only apply upon the threshold finding that the disputes at issue fall within the scope of the arbitration provisions. Even absent any contractual defects, parties cannot be compelled to arbitrate disputes outside the scope of an arbitration provision. If the Court concludes that claims based upon outright theft are not encompassed by the arbitration provisions here, then the analysis set forth in Prima Paint never arises as an issue.

Generally, the underlying basis for the Plaintiffs' claims is Gruttadauria's alleged theft of their assets. They argue that despite the breadth of the arbitration provisions, claims based upon the outright theft of assets are outside the scope. They rely heavily on an unreported Ohio appellate decision, *Cohen v. Painewebber, Inc.*, 2002 Ohio App. LEXIS 161, 2002 WL 63578 (Hamilton Cty. App. January 18, 2002). Like here, the plaintiff in Cohen sued a brokerage firm based upon allegations that a broker had stolen assets from a brokerage account. The account agreement required arbitration of "any and all controversies" relating to the account. The court held that claims based on theft were not within the scope of the arbitration clause:

> Although the arbitration provision is broad, stating that it covers any and all controversies pertaining to the brokerage account, we cannot say, as a matter of law, that a claim alleging such tortious conduct as the aiding and abetting of a theft is subject to the arbitration

> provision here. An arbitration clause itself is a contract. A contract requires a meeting of the minds as to the terms contained within. At the time that the parties entered into the contract, there was no meeting of the minds that the arbitration provision would cover claims alleging tortious forms of theft. If the parties had contemplated, at the time that they entered into the arbitration agreement, that PaineWebber would possibly steal from Ginsburg, that would surely be against public policy. Matters more likely to have been contemplated by both parties would have involved questions of whether a particular transaction was authorized or whether there was any miscalculation in the sum of money contained in the account. Here, the claims filed by Cohen alleged that PaineWebber and Wilhelm had engaged in conduct beyond the scope of the brokerage agreement. Zenni, allegedly with the knowledge of PaineWebber and Wilhelm, had sent altered and false monthly account statements to Ginsburg. Accordingly, under the stated circumstances in this case, we hold that, as a matter of law, the claims of unlawful conversion and fraudulent concealment, were not subject to the arbitration provision.

Id. at *3. Although Cohen, an unreported Ohio appellate decision, is not binding, this Court concurs

with its reasoning. Conduct amounting to theft is so beyond what is expected from a broker that such conduct could not have been within the reasonable contemplation of the Plaintiffs when they signed the alleged account agreements.

Recognizing that Cohen is not binding, the Defendants argue that the decision should be disregarded because it goes against the weight of long-standing case law favoring arbitration. The Court disagrees with the Defendants' characterization of Cohen as an aberration. The Plaintiffs assert tort claims such as fraud, conversion, theft, and breach of fiduciary duty. Cohen is the only case cited by the parties in which tort claims were brought based upon broker theft. In other contexts, however, Courts have considered the broader issue of whether tortious conduct is within the scope of broad, contractual arbitration clauses. Thus, Cohen is not an aberration, but merely constitutes one example of the broader issue of applying contractual arbitration clauses to tort claims.

Tort claims are subject to a contractual arbitration provision if based on factual allegations that fall within the scope of the provision. *Fyrnetics (Hong Kong) Limited v. Quantum Group, Inc.*, 2002 U.S. App. LEXIS 11923, 2002 WL 1312989 at *6 (7th Cir. June 18, 2002) (designated for publication); *Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382, 384 (11th Cir. 1996); *Carib Aviation and Marine Consultants, Ltd. v. Mitsubishi Aircraft International, Inc.*, 640 F. Supp. 582, 588 (S.D. Fla. 1986). Tort claims are outside the scope of the arbitration provision if they can be asserted independently without reference to the contract. *Ford v. Nylcare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243,

250 (5th Cir. 1998) (applying comparable Texas law). Applying these principles, courts in many cases have determined that tort claims are outside the scope of arbitration clauses of breadth comparable to that at issue here.

For example, in *Telecom Italia, SPA v. Whole Telecom Corp.*, 248 F.3d 1109 (11th Cir. 2001), the defendant brought a third party complaint against an entity from which it leased telecommunications circuits. The lease agreement called for arbitration of "any dispute arising out of or relating to this service agreement". The defendant alleged that the third party tortiously interfered and conspired to undermine its relationship with the plaintiff. The court (quoting a commentator) stated that "parties to an arbitration agreement should be compelled to arbitrate only those torts contemplated by the arbitration agreement." *Id.* at 1114. In determining whether the tort claims were subject to arbitration, the court considered whether the claims were the "immediate, foreseeable result of the performance of contractual duties". There, the tort claims were not arbitratable because the third party's conduct extended far beyond the reasonable expectations of the contracting parties. *Id.* at 1116-17 (emphasis added).

In *Ford, supra,* a physician entered into a medical services contract with an HMO. The contract had a provision requiring arbitration of all disputes "arising out of or relating to" the agreement. Dissatisfied with the way the HMO was advertising medical services, the physician brought suit for false advertising under the Lanham Act. The court concluded that, although the terms and polices set forth in the medical services contract were relevant, the competitive injuries alleged

under the false advertising claims rendered such claims outside the scope of arbitration. The false advertising claims were wholly independent from the existence of the contract. *Ford,* 141 F.3d at 252.

Similarly, in *Leadertex, Inc. v. Morganton Dyeing & Fishing Corp.,* 67 F.3d 20 (2d Cir. 1995), the parties executed a contract for the purchase of goods. In addition to claims arising from allegations of non-payment, the plaintiff brought a defamation claim asserting that the defendant made defamatory comments about the quality of the plaintiff's products to one of its customers. The underlying contract contained a broad arbitration provision applicable to "any controversy or claim arising under or in relation to this order or contract". The issue was whether the defamation claim was within the scope of the arbitration clause. The court recognized that resolution of the defamation claim would necessitate examining evidence relevant to the contract claims. The court concluded, however, that the defamation claim was not subject to arbitration because such a claim was beyond the parties reasonable expectations, and never contemplated, at the time the contract was executed. *Id.* at 28-29.

In *Sutton v. Hollywood Entertainment Corp.,* 181 F. Supp. 2d 504 (D. Md. 2002), the parties executed an agreement by which the plaintiff could rent movie videos from the defendant's store. There was an arbitration clause applicable to "any dispute arising out of or relating in any way to Applicant's relationship with HOLLYWOOD VIDEO". On March 1, 2001, an employee of the defendant incorrectly identified the plaintiff as the man who robbed the store the previous evening. The plaintiff was arrested and detained, but

later was exonerated after a review of the store surveillance video revealed that he was not the perpetrator. He brought suit for false imprisonment, malicious prosecution, and negligence. The court reasoned that the "relationship" referenced in the agreement meant the "relationship as a video renter". The court concluded that it was "logically untenable" that the video membership agreement was contemplated to cover claims arising out of accusations of theft. The claims, therefore, were not subject to arbitration. *Id.* at 510-12.

Finally, in *Hersman, Inc. v. Fleming Companies, Inc.*, 19 F. Supp. 2d 1282 (M.D. Ala. 1998), *aff'd*, 180 F.3d 271 (11th Cir. 1999), the plaintiff hired the defendant to oversee the development of a shopping center. As part of the project, they selected an architect and the parties executed an architectural agreement. It required that all "claims, disputes, or other matters in question ... arising out of or relating to this Agreement" be submitted to arbitration. Ultimately, the plaintiff brought suit asserting negligence and fraud in connection with the defendant's oversight of the project. The court concluded that the tort claims were not subject to arbitration because the plaintiff's allegations were independent of the obligations imposed by the architectural agreement. *19 F. Supp. 2d* at 1286-87.

These cases stand for the general proposition that tort claims are not subject even to a broad arbitration clause if the conduct at issue was beyond any reasonable foreseeability or contemplation at the time the contract was executed. Under these principles, Cohen was decided correctly and applies to this case.

Except for Cohen, the cases cited by the Defendants demonstrate the types of improper conduct that are reasonably foreseeable in a brokerage relationship. The cases involve such conduct as unauthorized trades, executing risky or poor investments inconsistent with an investor's stated investment objectives, generally failing to follow instructions, and "churning" (excessive trading for the purpose of artificially increasing commissions). What these activities have in common is that they stem from trading activity generally within the scope of employment of a broker. When an investor opens an account, it is at least reasonably foreseeable that disputes may arise concerning the propriety of certain trading activity. Such conduct can be subjected to arbitration regardless of how the claims are legally fashioned, be they, for example, framed as common law fraud, breach of fiduciary duty, statutory securities fraud, or even R.I.C.O.

On the other hand, an investor does not open a brokerage account contemplating the possibility that the assets might be stolen outright. The Plaintiffs' claims are outside the scope of the arbitration provisions because they arise out of alleged activity far beyond any conduct reasonably foreseeable or contemplated from a brokerage relationship. In addition, such claims are independent of any account agreements because they could be asserted even if there had never been any written account agreements.

III. CONCLUSION

Stated plainly, when the Plaintiffs signed the alleged account agreements, they had no reasonable concern or contemplation that their assets would be

stolen. There was, therefore, never any meeting of the minds with respect to any portion of the alleged account agreements, including the arbitration provisions. In addition, claims arising from allegations of outright theft are beyond the scope of such arbitration provisions. Accordingly, the Defendants' motions to compel arbitration and stay proceedings are **DENIED**.

IT IS SO ORDERED.
Issued: July 19, 2002

s/ John M. Manos

UNITED STATES DISTRICT JUDGE

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned cases this date, the Plaintiffs' claims are not subject to the arbitration provisions contained in the account agreements at issue. Accordingly, the Defendants' motions to compel arbitration and stay proceedings are **DENIED**. (See Fazio Docket Nos. 38, 48 and 54; Glazer Docket Nos. 26 and 36; Visconsi Docket Nos. 23 and 35; Spitalieri Docket Nos. 11 and 12; Lopardo Docket Nos. 13 and 17; Savoca Docket Nos. 12 and 16; Bonutti Docket No. 13.)

IT IS SO ORDERED.

Issued: July 19, 2002

s/ John M. Manos

UNITED STATES DISTRICT JUDGE

No. 02-247

OCT 2 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UBS PAINEWEBBER INC. AND RICHARD WILHELM,

Petitioners,

v.

ALFRED COHEN, EXECUTOR OF THE ESTATE OF SAMUEL GINSBURG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR HAMILTON COUNTY, OHIO

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In its petition, UBS PaineWebber, Inc. f/k/a PaineWebber Incorporated ("PaineWebber") showed a recurring and growing trend among state courts, including the lower court here, to use common law and state "public policy" to limit the enforceability of arbitration agreements under the Federal Arbitration Act ("FAA"). PaineWebber showed that this common law trend represents the apparent successor to prior efforts by state legislatures to roll back the federal policies favoring arbitration embodied in the FAA. And PaineWebber showed that this trend, developed in the lower court as an intentional-tort exception to enforceability under the FAA, will (if unchecked) undermine alternative dispute resolution from New York to California.

Respondent, understandably, takes a different tack. But his arguments in the end confirm rather than dispel the need for review. In proposing to make arbitrability turn solely on how claims are pleaded, respondent would allow both the creativity of a party's lawyer and judicially-created "public policies" to trump Congress's expressed pro-arbitration requirements in the FAA. For these reasons, those set forth in the petition, and those elaborated below, PaineWebber respectfully submits that this issue warrants the Court's immediate attention or at a minimum summary reversal.

1. At no point does respondent raise a jurisdictional impediment to reviewing the question presented. A final, appealable order is in place, and there is no independent and adequate state ground precluding review.

2. Respondent, tellingly, does not meaningfully deny that a sharp and growing division of authority exists between the (primarily federal) courts that compel arbitration on intentional-tort claims and the state judiciaries that are innovating intentional-tort exceptions to the FAA. Indeed, in trying to distinguish (at 8-9) the federal intentional tort cases from his own case based on the specific torts pleaded, respondent all but acknowledges the broader split. Unlike the

lower court here, the federal courts of appeal agree that when an arbitration clause encompasses "any and all" controversies between two parties, the FAA ensures that the agreement to arbitrate extends to intentional tort claims, no matter how they are pleaded. *See, e.g., Pers. Sec. & Safety Sys., Inc. v. Motorola, Inc.*, No. 01-11040, 2002 WL 1413702, at *4 (5th Cir. 2002); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 705 (D.C. Cir. 2001); *Harter v. Iowa Grain Co.*, 220 F.3d 544, 549 (7th Cir. 2000); *Brown v. Coleman Co.*, 220 F.3d 1180, 1184 (10th Cir. 2000); *Wood v. Prudential Ins. Co. of America*, 207 F.3d 674, 681 (3d Cir. 2000); *Am. Recovery Corp. v. Computerized Thermal Imagery, Inc.*, 96 F.3d 88, 90 (4th Cir. 1996); *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.*, 1 F.3d 639, 643 (7th Cir. 1993); *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 793 (8th Cir. 1988); *Aspero v. Shearson American Express, Inc.*, 768 F.2d 106, 107 (6th Cir. 1985).

3. Neither does respondent meaningfully challenge PaineWebber's showing that the lower court's treatment of Ohio's "public policy" for intentional tort claims fits within the broader national trend of state common-law precedent that is hostile to arbitration in general and the FAA in particular. Respondent, to be sure, disputes (at 9) the relevance of *Seifert v. U.S. Home Corp.*, 750 So. 2d 633 (Fla. 1999) and *Ex parte Discount Foods Inc.*, 711 So. 2d 992, *cert. denied sub nom. Supervalu Inc. v. Discount Foods, Inc.*, 525 U.S. 825 (1998), *reconsidered in part*, 789 So. 2d 842 (2001). But he does so on the ground that those cases deal with other state "policy" exceptions to the FAA. That of course is not only a distinction without difference but also merely appreciates that state common law is becoming the new route for avoiding arbitration. And if a state judiciary may supersede the FAA merely by recitation of a state public policy or common-law doctrine, it matters not whether that policy addresses "intentional torts" or "theft" or, as the Alabama Supreme Court put it, simply a state preference for a "jury of . . .

peers." These state-defined "policies" and common-law decisions are boundlessly adaptable and have few, if any, logical limits.

4. Respondent likewise leaves unchallenged PaineWebber's position (at 14-16) that the question presented is one of national importance. Respondent implicitly acknowledges, for example, that the lower court opinion tends to undermine the enforceability of arbitration agreements across the fields of labor, maritime, securities, and commercial law. Respondent fails to dispute that residents of Ohio, Florida, Alabama, and Arizona, where there is conflicting state and federal court authority, will face particular uncertainty. And respondent even leaves unaddressed PaineWebber's showing that the "intentional tort" exception to the FAA, if retained, would encourage claim-splitting and wasteful multi-forum litigation. Whether measured in monetary terms, the number of cases affected or the impact on the judiciary, the question presented does indeed raise important national issues.

5. Having all but conceded a split of authority on the propriety of state common-law exemptions to the FAA and the importance of the question presented, respondent primarily opposes review on the ground that the lower court's decision was correct. Because state law determines whether parties had a meeting of the minds as to the existence of an arbitration clause, respondent argues (at 3) that the lower court had the power to conclude that no such meeting of the minds occurred with respect to the scope of the signed agreement. Not true.

a. To begin with, the "meeting of the minds" explanation does not readily apply here. There is no dispute about the existence of an arbitration agreement and no dispute that the arbitration agreement extended to "any and all controversies" arising from respondent's accounts. These uncontroverted facts alone make respondent's authorities (at 3-4) irrelevant. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), for example, considered whether an

arbitration agreement ever was entered into by parties who did not sign it. *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 664 (7th Cir. 2002), addressed only whether a party who agreed to an arbitration clause expressly limited to "this Agreement" could be required to arbitrate breach-of-contract claims arising under other contracts. Respondent's other federal cases consider either the creation of a contract or the waiver of arbitrability, but never its scope. *See Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 105 (3d Cir. 2000) (formation); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991) (same); *Roney & Co. v. Kassab*, 981 F.2d 894 (6th Cir. 1992) (waiver); *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 27 (2d Cir. 1995) (same). Neither of respondent's two cited Ohio state cases (at 7) involve arbitration clauses at all.

b. But even if there were a dispute about the scope of the arbitration agreement, it was not one for the state courts to address. The well-understood presumption that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), has a corollary directly applicable here: When an arbitration contract is made, disputes concerning the "construction of the contract language itself" are themselves subject to arbitration. *Id.* at 25. *See also, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995). And this requirement is particularly true where, as here, the arbitration agreement itself includes standard language that "any and all controversies which may arise . . . concerning . . . the construction . . . of this or any other agreement" are subject to arbitration. (*See* Pet. 3; Pet. App. 5a.)

c. Respondent's meetings of the minds theory fails for still another reason as well. With the conclusory assertion (at 6) that "the parties failed to reach a meeting of the minds to arbitrate claims involving theft," respondent suggests that

the state court had some basis to parse the phrase "any and all controversies" on a claim-by-claim basis. But that suggestion, like the lower court's reasoning, turns the pro-arbitration presumption of the FAA on its head. As the Court has noted, the type of claim pleaded should not "color the lens through which the arbitration clause is read." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The touchstone, in other words, is the scope of the arbitration agreement, not the caption of the pleading.

6. Respondent's second argument (Opp. 8-11) is that his "theft" claim is *sui generis* and therefore unripe for review. That is wrong.

a. As an initial matter, respondent's attempt to frame this case as one of "theft" mischaracterizes his own pleadings. Respondent has sued only the brokerage firm and a supervisor, not the responsible broker, and respondent's theories all arise from an alleged failure-to-supervise.

b. Respondent also errs in characterizing his claims as "theft" rather than conversion. Under the law of Ohio and New York, "theft" is not a civil tort; conversion is. *Wolf v. Lakewood Hosp.*, 598 N.E.2d 160, 164 (Ohio App. 1991) ("The theft claim is nonexistent at civil law. Rather, the claim is rightfully termed as a tort of 'conversion.'"); *Jones v. Trump*, No. 96 CIV. 2995 (SAS), 1997 WL 277375, *6 n.9 (S.D.N.Y. May 27, 1997) ("Because New York common law does not recognize an independent tort of theft or larceny, I interpret plaintiff's claim for 'theft' to be one for conversion.") *Congregacion de la Mision Provincia de Venezuela v. Curi*, No. 96CV1914, 1998 WL 372468, *6 (E.D.N.Y. Apr. 24, 1998) ("When a defendant steals property belonging to the plaintiff . . . [t]he defendant becomes liable for the tort of conversion.")

c. Placing respondent's claims in their true light underscores the conflict between this lower court and other appellate bodies. Conversion and fraudulent concealment long

have been recognized as arbitrable claims under arbitration clauses identical in all material respects to the one at issue here. *Long v. Silver*, 248 F.3d 309, 314, 321 (4th Cir. 2001) (compelling arbitration where shareholder-employee alleged conversion of funds by insider for personal use); *Am. Express Financial Advisors, Inc. v. Makarewicz*, 122 F.3d 936, 939 n.3 (11th Cir. 1997) (finding "no reason to disagree" with the parties' contention that the FAA applied to a case which included a conversion claim); *PaineWebber, Inc. v. Faragalli*, 61 F.3d 1063, 1065 (3d Cir. 1995) (upholding district court's order to compel arbitration in case alleging, among other things, conversion and unjust enrichment); *Saari v. Smith Barney, Harris Upham & Co., Inc.*, 968 F.2d 877 (9th Cir. 1992) (finding that state-law claim of slander arising from public accusation of theft is subject to arbitration); *Kerr-McGee Refining Corp. v. M/T Triumph*, 924 F.2d 467, 471 (2d Cir. 1991) (upholding arbitration award arising from RICO and civil-conversion claims).

d. If anything, respondent's own authority—*Fazio v. Lehman Bros.*, No. 1:02CV157, 2002 U.S. Dist. LEXIS 15174 (N.D. Ohio July 19, 2002)—demonstrates that his "theft" claim is not unique, but instead a malleable tool that will keep many claims from arbitration. In *Fazio*, after all, the trial court used the lower court's opinion and "public policy" rationale in this case to conclude that the lower court's "theft" analysis also exempted from arbitration not just a claim pleaded as theft, but others including "fraud," "conversion," and "breach of fiduciary duty." (Opp. 12a.)

e. More, the lower court's effort to pare preferred claims out of the scope of an arbitration agreement has no bounds. Today, "theft" might be excluded. Tomorrow, claims that sound like theft—conversion, fraudulent concealment—might be exempted. Other allegations of serious, intentional, or quasi-criminal conduct then are cut loose, and soon enough, the parties' contract has been nullified by a state court in the interest of ever-changing state policy.

7. At all events, respondent's success in crafting the tort of "theft"—a success duplicated in *Fazio*—also underscores the susceptibility of federal arbitration policy to innovative state common law pleading. Having routinely rejected state legislatures' attempts to encroach on national arbitration policy, *see Doctor's Associates, Inc. v. Casaroto*, 517 U.S. 681, *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995), *Perry v. Thomas*, 482 U.S. 483 (1987), the Court should now establish that state courts may not do the same thing by a different name.

CONCLUSION

The Court should grant the petition or at a minimum the decision below should be summarily reversed.

Respectfully submitted,

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